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October 7, 2008

Stephen L. Johnson
Administrator
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Washington, DC 20460

James I. Palmer, Jr.
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U.S. EPA
Sam Nunn Atlanta Federal Center
61 Forsyth St., SW
Atlanta, GA 30303-3104

David L. Moore
Executive Director
SWFWMD
2379 Broad Street
Brooksville, FL 34604-6899

Rick Baker, Mayor
City of St. Petersburg
P.O. Box 2842
St. Petersburg, FL 33731-2842

Re: Clean Water Act Notice of Intent to Sue for Failure to Perform Mandatory Duties Related to Florida's Outstanding Florida Water Classification and "Existing Uses" of Waters.

Dear Sirs:

Alfred J. Davis and Cynthia F. Davis (Mr. and Mrs. Davis) hereby notify Administrator Stephen L. Johnson, Regional Administrator James I. Palmer, Jr. of EPA Region IV, the U.S. Environmental Protection Agency (EPA), Southwest Florida Water Management District (SWFWMD) Executive Director David Moore, and Mayor Rick Baker of the City of St. Petersburg, Florida of their intent to sue under Section 505(a)(2) of the Clean Water Act (CWA) and Florida common law concerning the failure of the EPA Administrator, EPA Regional Administrator, EPA, SWFWMD, and the City of St. Petersburg, Florida to comply with their mandatory duties and criteria of the CWA and Florida common law. The specifically failures are summarized as follows.

a) The EPA Administrator, the EPA Regional Administrator, and EPA have failed to promulgate baseline existing ambient water quality standard for any of the 309 Outstanding Florida Waters (OFW) in the face of Florida's long standing failure to establish and adopt such baseline year existing ambient OFW water quality standards.

b) The EPA Administrator, the EPA Regional Administrator, and EPA have failed

to access the baseline year existing ambient water quality of OFWs to determine whether OFWs have degraded below the applicable baseline year existing ambient water quality standard for each of the 309 OFWs;

c) The EPA Administrator, the EPA Regional Administrator, and EPA have failed to identify and assess the existing uses of Florida waters which existed on or after November 28, 1975 to determine whether these existing uses¹ have been fully protected by existing Florida water quality standards and implementation criteria as required by 40 C.F.R. Section 131.12(a)(1) & (2) and Florida Rules 62-303.200(13) and 62-302.300(14).

d) The EPA Administrator, the EPA Regional Administrator, and EPA have failed to disapprove Florida's incomplete Section 305(b) Water Quality Assessment and Section 303(d) List of the CWA list of water bodies which have not included assessment of OFW existing ambient water quality and "existing uses."

e) EPA Administrator, the EPA Regional Administrator, and EPA have failed to require the use of existing OFW ambient water quality and "existing uses" in National Pollution Discharge Elimination System (NPDES) permit review and permit issuance.

f) SWFWMD and the City of St. Petersburg have discharged stormwater and sediments into Clam Bayou in Pinellas County which have caused and contributed to violations and impairment of the CWA water quality of Clam Bayou, killed off seagrass beds, eliminated clam beds in Clam Bayou, covered Clam Bayou soils suitable for sea grass and clam beds with contaminated sediments, and filled Clam Bayou navigation channels with sediment.²

Mr. and Mrs. Davis are adversely affected by the above described failures because they reside on and use Clam Bayou in Pinellas County, Florida, and Clam Bayou is an OFW designated water body which is impaired due to point source discharges.

I. Statutory and Regulatory Background

"The Clean Water Act requires each state to adopt water quality standards applicable to intrastate waters and submit them to the Administrator for his review, to determine whether the standards are consistent with the minimum requirements of the Act. 33 U.S.C. Section 1313." ManaSota-88, Inc. v. Tidwell, 896 F.2d 1318, 1320 (11th Cir. 1990).

Water quality standards are provisions of state or federal law which consist of: designated uses; existing uses; state and federal anti-degradation policies; and water quality criteria. See, 40

¹"Existing uses" are uses which actually attained on or after November 28, 1975, whether or not they are included in water quality standards. 40 C.F.R. 131.3(e). See, Fla. Rule 62-302.200(13) (definition of "existing use").

² The filling of navigation canals also constitutes a common law nuisance and trespass of ingress and egress rights.

C.F.R. Section 131.3(i) (EPA definition of water quality standards); 33 U.S.C. Section 1313(c).³

The federal anti-degradation rule is set forth at 40 CFR 131.12 and reads in pertinent part as follows.

“131.12 Antidegradation policy.

(a) The state shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall at a minimum be consistent with the following:

(1) Existing instream uses and level of water quality necessary to protect those uses be maintained and protected.⁴

(2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be protected unless the state finds, after full satisfaction of the intergovernmental coordination and public participation provision of the state’s continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lowering of water quality, the state shall assure water quality adequate to protect existing uses fully. Further, the state shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing sources and all cost-effective and reasonable best management practices for non-point source control”. (e.s.).

Section 303(d) of the Act, and EPA’s implementing regulations, 40 C.F.R. Section 130.7(b)-(e) require states to identify water bodies which do not meet adopted water quality standards. States must: (1) identify waters for which applicable technology-based effluent limitations and other controls are not stringent enough to implement water quality standards; (2) establish a priority ranking for such waters; and (3) establish total maximum daily loads (“TMDLs”) for those waters not in attainment of water quality standards.

While the CWA places primary authority on states for setting water quality standards, EPA has the mandatory duty to review state water quality standards to ensure the consistency of the standards with the requirements of the CWA, and publish and adopt EPA promulgated water quality for a state which fails to enact state water quality standards necessary to meet the requirements of the CWA. The Administrator has a mandatory duty to assess the sufficiency of previous adopted state water quality standards and implementation criteria meet the requirements

³ Florida’s rules also define water quality standards to include the antidegradation policy. See, Fla.Admin.Code R. 62-302.200(31).

⁴ Section 131.12(a)(1) is the Tier I federal antidegradation “existing use” requirements.

of the Act, even if the state fails to submit new or revised water quality standards and implementation criteria to the EPA. If the state fails to submit sufficient water quality standards and implementation criteria, the Administrator has the mandatory duty to publish and adopt EPA promulgated standards and implementation criteria for the state to ensure compliance with the goals and requirements of the Act. 33 U.S.C. Section 303(c)(4)(B). ⁵

II. Failure to Calculate Existing Ambient Water Quality for OFWs, Evaluate Impairment Status of OFWs, and TMDLs Based Upon OFW Existing Ambient Water Quality

Since 1979 Florida has designated 309 waterbodies as OFWs. Florida's EPA-approved water quality standards define as the "existing ambient water quality" as the water quality standard for OFWs.

Despite this CWA required EPA-approved OFW water quality standards and criteria, Florida has not determined and established the "existing ambient water quality" for the baseline year for each of the designated 309 OFWs, nor has Florida assessed each of the designated 309 OFWs to determine if the "existing ambient water quality" standard of the baseline year any of the 309 OFWs has been degraded below the applicable "existing ambient water quality standard." Florida has also failed to establish TMDLs based upon OFW existing ambient water quality for those OFW that have impaired water quality.

A. Florida's OFW Rules

Florida's antidegradation policy is set forth in Rule 62-4.242 and 62-302.700 which contains DEP's Special Protection, Outstanding Florida Water and Outstanding National Resource waters criteria. The major component of Florida's antidegradation policy is Florida's special category of water bodies in Florida referred to as OFWs.⁶ Florida's special category of OFWs was created by state statute (Section 403.061(27), Fla. Stat.) and DEP's regulations at Rules 62-302.700, 62-302.200(19),⁷ and 62-4.242(2)&(3).

⁵ Administrator Stephen L. Johnson has delegated these non-discretionary duties of his under the Act to Regional Administrator James I. Palmer, Jr. of EPA Region IV. See, 40 C.F.R. Section 131.20(c), 131.21(a)-(b).

⁶ Florida's antidegradation policy was modified in the late 1980s as a result of a successful citizen suit under the Act against EPA's Regional Administrator. See, Manasota-88, Inc. v. Tidwell, Supra.

⁷ Rule 62-302.200(19) defines "Outstanding Florida Waters" as "waters designated by the Environmental Regulation Commission as worthy of special protection because of their natural

Section 403.061(27), Fla. Stat. grants DEP the power and duty to:

“(27) Establish rules which provide for the special category of water bodies within the state, to be referred to as “Outstanding Florida Waters,” which water bodies shall be worthy of special protection because of their natural attributes. Nothing in this subsection shall affect any existing rule of the department.”

Florida Rule 62-302.700 reads in pertinent part as follows.

“62-302.700(1) Special Protection, Outstanding Florida Waters, Outstanding National Resource Waters.

(1) It shall be the Department policy to afford the highest protection to Outstanding Florida Waters and Outstanding National Resource Waters. No degradation of water quality, other than that allowed in Rule 62-4.242(2) and (3), F.A.C. is permitted in Outstanding Florida Waters and in Outstanding National Resource Waters, not withstanding any other Department rules that allow water quality lowering.⁸ (e.s.).

Florida Rule 62-302.700(8) provides as follows.

“(8) For each Outstanding Florida Water listed in Rule 62-302.700(9), the last day of the baseline year for defining the existing ambient water quality (Rule 62-4.242(2)(c)) is March 1, 1979, unless otherwise indicated. Where applicable, Outstanding Florida water boundary expansions are indicated by date(s) following “as mod.” under Rule 62-302.700(9).⁹ For each Outstanding Florida water boundary which expanded subsequent to

attributes.”

⁸ The relationship of the OFW designation and other designated uses of water bodies is set forth in Rule 62-302.400(10) which reads as follows.

“The surface waters of the State of Florida are classified as Class III-Recreation, Propagation and Maintenance of a healthy, Well-Balanced Population of Fish and Wildlife, except for certain waters listed which are described in this Rule 62-302.400(12). A water body may be designated as an Outstanding Florida Water or an Outstanding National Resource Water in addition to being classified as a Class I, Class II, or Class III. A water body may also have special standards applied to it. Outstanding Florida waters and Outstanding National Waters are listed in Rule 62-302.700, F.A.C.” (e.s.).

⁹ The 309 Florida water bodies designated as OFWs are listed in Florida Rule 62-302.700(9) and include: four (4) national parks or national memorials; twenty-eight (28) national

the original date of designation, the baseline year for the entire Outstanding Florida Water, including the expansion, remains March 1, 1979, unless otherwise indicated.”

Florida Rule 62-4.242(2)(a) provides

“(a) “No Department permit or water quality certification shall be issued for any proposed activity or discharge within an Outstanding Florida Water, or which significantly degrades, either alone or in combination with other stationary installation, any Outstanding Florida Waters,....”¹⁰

Florida Rule 62-4.2.42(c) provides:

“(c) For purposes of this section the term ‘existing ambient water quality’ shall mean (based upon the best scientific information available)¹¹ the better water quality of either (1) that which could be expected to have existed for the baseline year of an Outstanding Florida Water designation or (2) that which existed during the year prior to the date of a permit application. It shall include daily, seasonal, and other cyclic fluctuations, taking into consideration the effects of allowable discharges for which Department permits were issued or applications for such permits were filed and complete on the effective date of designation.”

Florida’s OFW rule establishes "existing ambient water quality" as the OFW water quality standard.¹² Water quality degradation in violation of DEP's OFW existing ambient water quality standard is a violation of DEP's water quality standards. OFWs degraded in violation of

wildlife refuges; seventy-six (76) state parks or recreation areas; fifteen (15) state ornamental gardens, botanical sites, historic sites and geological sites; twenty (20) state preserves or reserves; sixty-eight (68) publicly owned areas acquired by donation, trade or purchase; two (2) national seashores; forty-three (43) state aquatic preserves; forty-one (41) designated “Special Waters”; three (3) designated wild and scenic rivers; two (2) national preserves; two (2) marine sanctuaries; two (2) national estuarine research reserves; and three (3) national forests.

¹⁰ A direct pollutant discharges to an OFW cannot lower the existing ambient water quality of the OFW. An indirect discharges cannot significantly degrade the existing ambient water quality of the OFW. All proposed activities and discharges in an OFW must be “clearly in the public interest.”

¹¹ The phrase “based upon the best scientific information available” means use of whatever data is available, regardless of the quantity of such information and samples.

¹² DEP's OFW rule is an U.S. EPA approved DEP water quality standard.

existing water quality are impaired waters.

B. The OFW Related Violations

The Administrator and EPA have a non-discretionary duty to calculate OFWs existing ambient WQ when identifying impaired waters on a 303(d) list. DEP has not established the "existing ambient water quality" standard for designated OFWs.¹³

In addition to Clam Bayou, another example of the OFW existing ambient water quality failure to implement is the Little Manatee River OFW in Hillsborough and Manatee counties. It was declared an OFW effective on October, 1982. In 1998 Lewis Environmental Services, Inc. analyzed the Little Manatee River OFW water quality data and made a recommendation as to what was the existing ambient water quality was in the year prior to October, 1982. On December 31, 1998 this report was mailed to DEP requesting DEP to adopt the existing ambient water quality recommendation of the Lewis Environmental Services report for the Little Manatee River OFW. This report found that the 1998 water quality of the Little Manatee River OFW had degraded below the existing ambient OFW water quality of the Little Manatee River. DEP has not yet adopted any existing ambient water quality for the Little Manatee River OFW or any other of the 309 OFW's in Florida. DEP has also not done any analysis of the whether current water quality of OFWs has degraded below the existing ambient water quality of any of the 309 OFWs in Florida .

The EPA Administrator, the EPA Regional Administrator, and EPA have a non-discretionary duty to promulgate existing ambient water quality criteria and standards for the 309 OFWs in Florida due to Florida's long standing failure to establish and adopt such existing ambient OFW water quality standards. Once the existing ambient water quality for the 309 OFWs is established, the Administrator and EPA have a non-discretionary duty to access the existing ambient water quality of OFWs to determine whether current water quality of the 309 OFWs have degraded below the applicable existing ambient water quality standard for each the OFWs.

Likewise, because Florida has not analyzed whether the current water quality of OFWs has been degraded below existing ambient water quality for the 309 OFWs, the EPA Administrator, the EPA Regional Administrator, and EPA have a duty to disapprove Florida's incomplete Section 303(d) of the Act list of water bodies for which Florida's applicable technology-based effluent limitations and other controls are not stringent enough to implement water quality standards, and Florida's 305(b) Assessment Report.

¹³ On January 31, 2001 the Tampa Bay Regional Planning Council's Agency on Bay Management wrote to DEP urging DEP "to move swiftly to complete the study now underway to establish the ambient water conditions for each Outstanding Florida Water."

IV. Failure to identify and assess the existing shellfish harvest uses which existed on or after November 28, 1975

Florida records of past and present shellfish harvesting areas are kept by the Division of Aquaculture¹⁴ of the Florida Department of Agriculture and Consumer Services (DOACS). The DOACS records indicate the location of shellfish harvesting waters and shellfish harvesting sanitation conditions on and after November 28, 1975.

DEP has not analyzed the DOACS shellfish evaluation and assessment data to identify and assess the shellfish harvesting uses which existed on or after November 28, 1975 to determine whether these existing shellfish harvesting uses have been fully protected by existing Florida water quality standards and implementation criteria as required by 40 C.F.R. Section 131.12(a)(1) & (2) and Rule 62-302.300(14).

The EPA Administrator, the EPA Regional Administrator, and EPA must disapprove Florida's incomplete Section 305(b) Water Quality Assessment and incomplete Section 303(d) List of water bodies due to the failure to assess "existing uses".

V. NPDES Failures

The EPA Administrator, the EPA Regional Administrator, and EPA have failed to require the use of existing OFW ambient water quality and existing uses in all NPDES permit review and permit issuance criteria, including NPDES permits for discharges into Clam Bayou.

VI. Water Quality Violations—Sea Grass and Clam Beds Lost

The SWFWMD and the City of St. Petersburg have each illegally discharged stormwater and sediments into Clam Bayou in Pinellas County which are causing and contributing to numerous environmental problems and nuisances, including causing and contributing to violations and impairment of the CWA water quality of Clam Bayou. As described above, the discharge of contaminated the sediments to Clam Bayou continues to cause and contribute to water quality violations and impairment, as well as having killed off seagrass beds, eliminated clam beds in Clam Bayou, and covered Clam Bayou soils suitable for sea grass and clam beds with contaminated sediments.

The SWFWMD and City of St. Petersburg point source discharges of unnatural sediments into Clam Bayou have filled navigation channels with sediment, virtually eliminating navigation

¹⁴ Shellfish Evaluation and Assessment Section (SEAS).

Admin. Stephen L. Johnson
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in and out of Clam Bayou, an activity which violates the CWA and Florida common law (nuisance and trespass of ingress and egress property rights).

Sincerely,

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